SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 518

PATRICK CUDAHY FAMILY COMPANY,
Petitioner,

vs.

CHESTER BOWLES, PRICE ADMINISTRATOR,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

The Opinion of the Court Below.

The opinion of the United States Emergency Court of Appeals is reported in the Pike & Fischer OPA Service, page 612:49. We believe it has not yet been reported in an official report of the Court.

II.

Jurisdiction.

The statutory provisions, which it is believed sustained the jurisdiction of this Court, and also the facts relating to jurisdiction, have already been stated in the Petition for

Writ of Certiorari at Section II thereof, which statement, with respect to jurisdiction, is hereby adopted and made a part of this brief.

III.

Statement of the Case.

The statement of the case has already been set forth in the Petition for Writ of Certiorari in connection with which this brief is filed, under Section I thereof entitled "SUMMARY OF MATTER INVOLVED" and said statement is hereby adopted and made a part of this brief.

IV.

Specification of Errors.

The "specification of errors", which are the issues which would be before the Court when the case is presented on its merits, if certiorari is granted, are the same as the "questions presented" which are set forth in Section III of the Petition for Writ of Certiorari and are here set out in the affirmative form of a list of errors of the Emergency Court of Appeals.

1. The Emergency Court of Appeals erred in holding that the validity of a Regulation of the Price Administrator could not be raised for the first time in the Emergency Court of Appeals and, by implication, in holding the validity of the Emergency Price Control Act of 1942 could not be raised for the first time in the Emergency Court of Appeals which is contrary to the provisions of the Act which confer exclusive jurisdiction to decide such questions on the Emergency Court of Appeals.

2. The Emergency Court of Appeals erred in failing to hold that the Emergency Price Control Act of 1942

A. Is void for the reason that it illegally delegates legislative power to the Price Administrator; and

B. Is void as in violation of the due process clause of the Fifth Amendment to the Federal Constitution because no lawful standard for determining reasonable rent rates is provided in the Act.

3. The Emergency Court of Appeals erred in failing to hold that the challenged rent fixing Regulation is unconstitutional and void as being in violation of the due process clause of the Fifth Amendment to the Federal Constitution in that

A. It is retroactive in its operation and thus injuriously affects vested contract rights of the owners of rented property; and

B. It fixes rental rates arbitrarily and without reference to a reasonable rate and requires the furnishing of service even though it be at a loss; and

C. It retroactively fixed rates as of March 1, 1942, without lawful notice, findings of fact or effective opportunity for the affected parties to be heard.

4. The Emergency Court of Appeals erred in failing to hold that the action of the Price Administrator was arbitrary and capricious in applying his Regulation to the facts presented upon the application of the petitioner for relief.

V.

Summary of Argument.

Point A. The Court below erroneously decided an important question of federal administrative law in holding in substance that an administrative officer can and must pass upon the constitutionality of the Act which created his office and upon the validity of his own regulations before the reviewing court will entertain such questions. This decision conflicts with the Act itself and the holdings of

this Court and the decision should be corrected by this Court because of its far-reaching importance.

Point B. The lower court by necessary implication decided that the Price Control Act of 1942 is constitutional and because of its vital importance to millions of citizens the decision should be reviewed by this Court. It is the position of petitioner that the Act is, in fact, unconstitutional because

A. It illegally delegates legislative power, and

B. Violates the due process clause in failing to prescribe standards for fixing rents.

Point C. The court below erroneously sanctioned an arbitrary and capricious action of an administrative officer in sustaining his rent regulation which is unconstitutional and void and because of the far-reaching vital effect of the Regulation the decision of this Court is necessary. The regulation is invalid because it

A. Retroactively fixed rents injuriously affecting vested contract rights;

B. Arbitrarily fixed rents without reference to reasonable rates and required furnishing service at a loss;

C. Retroactively fixed rents without lawful notice, adequate opportunity to be heard or proper findings of fact.

Point D. The Court below decided an important question of local law in conflict with local decisions and the decisions of this Court by its holding that such regulations supersede the local law governing real estate.

VI.

Argument.

Point A.

As to the Regulation: The Emergency Court of Appeals, in its opinion, held that the Price Administrator's order on petitioner's protest was permissible under the maximum rent Regulation #35 and in so holding, by necessary implication, the Court held that Regulation was valid. The Court below said "A protest against an order denying an application for adjustment does not open for review the validity of the Regulation itself * * *" (R. 65), thus holding that the Regulation cannot be attacked in the Court unless it has been questioned before the Administrator who issued the Regulation. Under the Act, Section 203 (a) * a protest against a general Regulation could only be made in the first 60 days after the Regulation is promulgated. This ruling of the Court amounts to a practical denial to virtually every person affected of ever having a Court's determination of the validity of the Regulation because parties affected by the general Regulation did not know how it affected them until a specific situation arose under the Act and practically no one knew within 60 days after the Regulation was promulgated how it was going to affect him. In fact very few people knew what the Regulation meant until months of experience with it had elapsed.

In the instant case it was not until the tenant had died long after the Regulation had been promulgated and the landlord was free to contract for a new rental that it learned how the Regulation affected him and that the Administrator claimed it required him to charge an inequitable rent substantially below the fair and reasonable rent. He then promptly petitioned the Administrator for relief under

* See Appendix.

the Regulation and it was not until the Administrator had construed his own Regulation as not affording petitioner with relief that petitioner was aggrieved.

By that time any opportunity to make a general protest against the whole Regulation had long since passed and the petitioner's only recourse was to appeal from the order as being arbitrary and capricious and being not in accordance with the Regulation, or if it was in accord therewith, then that the Regulation itself was arbitrary and invalid.

The Court, by saying in substance that the landlord could have no court review of the general Regulation because the landlord failed to protest against that Regulation within 60 days after it was adopted, and before the landlord even knew that the Administrator would arbitrarily and capriciously deny him relief in effect says the landlord should have foreseen in advance an arbitrary and capricious action upon the part of the Administrator and says that since he failed to foresee such action he has no recourse to the courts. It would seem to require the landlord to have protested against something before he had been harmed or could have known he would be harmed.

Section 204 (a) of the Act specifically provides as follows:

> "Any person who is aggrieved by the denial or partial denial of his protest may, within thirty (30) days after such denial file a complaint with the Emergency Court of Appeals created pursuant to Sub-section 6 specifying his objections and praying that the Regulation, order or price schedule protested be enjoined or set aside in whole or in part."

That is exactly the procedure followed by the petitioner. He had first sought relief from the Administrator upon the facts. He claimed the Regulation afforded him relief and obviously he was attacking the Regulation itself if it were as construed that it didn't afford him relief. His very protest called in question the Regulation itself.

While it may be argued that technically and strictly construed the petitioner's protest did not explicitly, in the first instance, attack the general Regulation excepting only as that was naturally implied in the petitioner's request to the Administrator for relief from the fact situation in which he had been placed, as this Court said in *Hormel* v. *Helvering*, 312 U. S. 552, 61 Sup. Ct. 719, 85 L. Ed. 1037.

> "There may always be exceptional cases or particular circumstances which will prompt a reviewing or appellate court, where injustice might otherwise result, to consider questions of law which were neither pressed nor passed upon by the court or administrative agency below. See Blair *v.* Oesterlein Mach. Co., 275 U. S. 220, 225, 72 L. ed. 249, 252, 48 S. Ct. 87.
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> "Rules of practice and procedure are devised to promote the ends of justice, not to defeat them. A rigid and undeviating judicially declared practice under which courts of review would invariably and under all circumstances decline to consider all questions which had not previously been specifically urged would be out of harmony with this policy. Orderly rules of procedure do not require sacrifice of the rules of fundamental justice."

And as held in that case the Court will take hold of a situation that demands its action even though a party may have inadvertently failed to fully comply with all the procedural requirements of an administrative agency.

That is particularly true of this particular requirement of this Act as pointed out in *Payne* v. *Griffin*, U. S. Dist. Ct. M. D. Georgia decided August 30, 1943, 51 Fed. Supp. 588, where the court said:

> "After the administrator fixes the maximum rent, the provision for protest and appeal, it is said, affords due process. It might do so theoretically but not actually. In the Morgan case supra, the court held that, 'In administrative proceedings of a quasi-judicial

character, the liberty and property of the citizen must be protected by the rudimentary requirements of fair play. These demand a fair and open hearing.'

"People know they are charged with knowledge of the law but, without actually knowing the law, they have been accustomed to make defenses only when the law is sought to be enforced against them. An act which permits an administrator to fix prices without notice or hearing and then makes those prices conclusive after 60 days would, in practical operation, have the effect of cutting off defenses. That is especially true where the procedure provided makes it too inconvenient and expensive for individuals in small cases to follow the procedure. Ordinarily, when Congress itself passes a law, it does not try to make the law immune from attack or prohibit defenses but permits defenses to be made at any time an individual is proceeded against under the law. If the matter is subject to very strict construction, then this act may technically provide due process, but practically it would result in entrapping a large number of citizens. That might not constitute the fair play intended by the Supreme Court."

As to the Act:

Furthermore, the opinion of the Court below in holding the order under the Regulation to be binding, holds by necessary implications that the Act itself is constitutional and by its holding that no objection not specifically presented to the Administrator will be reviewed by the Court, holds in effect that there must be presented to the Administrator the question of the constitutionality of the law before the Court will pass upon it.

This is expressly in contravention to Section 204 (d) of the Act which provides in substance as follows:

"The Emergency Court of Appeals and the Supreme Court upon review of judgments and orders of the Emergency Court of Appeals, shall have exclusive

jurisdiction to determine the validity of any Regulation or order issued under Section 2 of any price schedule effective in accordance with the provisions of Section 206 and of any provision of any such Regulation, order or price schedule, except as provided in this Section, no court, Federal, State or Territorial, shall have jurisdiction or power to consider the validity of any such Regulation, order or price schedule, or to stay, restrain, enjoin or set aside, in whole or in part, any provision of this Act authorizing the issuance of said Regulations or orders * * *"

Not only is the decision in the Court below in refusing to consider the constitutionality of the Act unless that question was raised before the Administrator, contrary to the above quoted Section of the Act itself, but it is contrary to the decisions of this Court which hold in substance with respect to the powers of administrative bodies, that the construction of statutes and other laws is a matter which ultimately is solely for the courts and that it is their solemn duty to exercise such power and that they cannot surrender or waive the same. It is the laws which must govern rather than an executive or administrative officer's opinion.

C. M. St. P. & P. R. R. Co. vs. *McCaull-Dinsmore Company* 253 U. S. 97, 64 L. Ed. 801, 40 Sup. Ct. 504.

U. S. v. *Dickson*, 15 Pet. (U. S.) 141, 10 L. Ed. 689.

Point B. As indicated in Point A the Court, in upholding the validity of the Regulation of the Price Administrator issued pursuant to the Emergency Price Control Act of 1942 and further in denying petitioner's motion to amend its complaint on the subject of the constitutionality of the Act by necessary implication held the Act to be constitutional.

This Act authorized a far-reaching and wide-sweeping scheme for rent control and prices of commodities affect-

ing millions, if not actually all, of the citizens throughout the country. Extremely serious and vital questions are involved in the interpretation of the Act, which questions will be before this Court on the merits in the event that this petition is granted.

Magnum Import Co. v. *Coty*, 262 U. S. 159, 43 Sup. Ct. 531, 67 L. Ed. 922.

The Act illegally delegates legislative power in permitting the Administrator to fix rents which, in his judgment, will be fair and equitable without setting up a sufficient standard for his guidance.

Field & Co. v. *Clark*, 143 U. S. 649, 36 L. Ed. 294.

Wichita Railroad v. *Public Utilities Commission*, 260 U. S. 48, 43 Sup. Ct. 51, 67 L. Ed. 124.

Hampton & Co. v. *U. S.*, 276 U. S. 394, 48 Sup. Ct. 348, 72 L. Ed. 624.

Panama Refining Company v. *Ryan*, 293 U. S. 388, 55 Sup. Ct. 241, 79 L. Ed. 446.

St. Joseph's Stock Yards Co. v. *U. S.* 298 U. S. 38, 56 Sup. Ct. 720, 80 L. Ed. 1033.

The Act, further, in failing to prescribe standards for fixing rent, violates the due process clause of the Fifth Amendment to the federal constitution as held in the cases just above cited and also in *Morgan* v. *U. S.* 304 U. S. 1, 58 Sup. Ct. 773, 82 L. Ed. 1129.

It is sufficient to repeat, for the purpose of this petition, that this law is highly important to millions of citizens, both landlords and tenants, involves wide-sweeping control of private property, seriously affects the entire economic structure of the nation and has been before numerous lower courts of the land in one phase or another. Its constitutionality has not as yet been, but should be, finally settled by the decision of this Court.

Point C. The decision of the lower court, in sustaining his rent Regulation, sanctions an arbitrary and capricious action of an administrative officer. This rent Regulation is unconstitutional and void because:

A. It retroactively fixed rents injuriously affecting vested contract rights.

Block v. *Hirsh,* 256 U. S. 135, 41 Sup. Ct. 458, 65 L. Ed. 865.

Edgard A. Levy Leasing Co. v. *Siegel,* 258 U. S. 242, 42 Sup. Ct. 289, 66 L. Ed. 595.

Nichols v. *Coolidge,* 274 U. S. 531, 47 Sup. Ct. 710, 71 L. Ed. 1184.

Welsh v. *Henry,* 305 U. S. 134, 59 Sup. Ct. 121, 83 L. Ed. 87.

B. It arbitrarily fixed rents without reference to reasonable rates and required furnishing of service at a loss.

Railroad Commission v. *Eastern Texas Railroad Co.,* 264 U. S. 79, 44 Sup. Ct. 247, 68 L. Ed. 569.

C. It retroactively fixed rents without lawful notice, adequate opportunity to be heard or proper findings of fact.

Nichols v. *Coolidge,* 274 U. S. 531, 47 Sup. Ct. 710, 71 L. Ed. 1184.

Welch v. *Henry,* 305 U. S. 134, 59 Sup. Ct. 121, 83 L. Ed. 87.

St. Joseph Stockyards Co. v. *U. S.,* 298 U. S. 38, 56 Sup. Ct. 720, 80 L. Ed. 1033.

Mahler v. *Eby,* 264 U. S. 32, 44 Sup. Ct. 283, 68 L. Ed. 549.

Morgan v. *United States,* 304 U. S. 1, 58 Sup. Ct. 773, 82 L. Ed. 1129.

This action of the lower court in sanctioning such an arbitrary and capricious Regulation and action and per-

mitting an administrative officer to issue and endeavor to enforce a wholly invalid but vital, important and far-reaching Regulation, requires this Court to exercise its supervisory power to correct the erroneous decision.

Point D. On March 1, 1942, because of a contract under which the particular landlord had been unable, for more than a year prior thereto to increase the rent, the landlord was receiving a rent substantially below the prevailing rent for similar housing accommodations,—in other words, it was receiving an unfair and inequitable rent. The Price Administrator, without notice, without hearing, without findings of fact, five months later, retroactively froze rents as of March 1, 1942, and failed to make adequate provision for relief against an inequitable situation such as disclosed by the facts here,—at least, the Price Administrator's position in this case is that he had failed to make provision for any such relief. Such a situation amounts to an unconstitutional deprivation of private property by the capricious act of an administrative official without due process of law.

The Price Administrator in his orginal rent fixing Regulation had made provisions for relief in a few cases, one of which petitioner believed was applicable to it. Had the local law of Wisconsin been applied as it should have been to the interpretation of the Wisconsin rental contract involved, which contract involves the transfer of an interest in and the use and possession of Wisconsin real estate, it would have been held below that the term of the rental agreement here involved commenced May 1, 1939. *Sheppard* v. *Rosenkrans* 109 Wis. 58, 85 N. W. 199.

It would also have been held that February 28, 1941, was the last date on which the landlord could have given notice that the lease would terminate on April 30, 1941. *Ward* v. *Walters* 63 Wis. 39, 22 N. W. 844.

Under either of those conclusions the landlord would have been clearly entitled to the relief afforded by Section 1388.3055 (a) (5) of the Regulation #35 which grants relief if

> "There was in force on March 1, 1942, a written lease, for a term commencing on or prior to March 1, 1941, requiring a rent substantially lower than the rent generally prevailing in the Defense-Rental Area for comparable housing accommodations on March 1, 1942 * * *." (R. 59)

To justify his denial of relief to petitioner, the Administrator had to resort to the proposition that the general rule that the lex loci rei sitae governs, does not apply to his Regulations. The Court below upheld his contention and in so doing ignored the local law and rendered an important decision contrary to the decisions of this Court and of the courts of nearly every other jurisdiction.

> "A principle of law which is acquiesced in by the jurists of all civilized nations and thus part of the jus gentium is that all real or immovable property is exclusively subject to the laws of the country within which it is situated, and no interference with it by any other sovereignty can be permitted. Therefore, *all matters* concerning the title and disposition of real property are determined by what is known as the lex loci rei sitae, which can alone prescribe the mode by which a title to it can pass from one person to another or an interest therein of any sort can be gained or lost. This general principal includes all rules which govern the descent, alienation, and transfer of such property and the validity, effect and construction of wills and other conveyances." 11 Am. Jur. 328. (Our italics)
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> *Sunderland* v. *United States*, 266 U. S. 226, 45 Sup. Ct. 64, 69 L. Ed. 259.

Conclusion.

It is respectfully urged that this Court should grant the petition prayed for to the end that extremely important questions of far-reaching national importance may be properly decided.

Respectfully submitted,

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